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No. 1031

IN THE

# Supreme Court of the United States

OCTOBER TERM 1969

FLOYD FEATHERSTON,
*Petitioner,*

vs.

JOHN MITCHELL, Attorney General
of the United States, ET AL.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Floyd Featherston, petitioner, prays that a writ of certiorari issue to review the judgment entered in this case on November 10, 1969, by the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The district court opinion is *Featherston v. Clark, et al.*, 293 F. Supp. 508 (W.D. Tex. 1968). The opinion of the United States Court of Appeals for the Fifth Circuit has not been officially reported at the time of the writing of this petition; however, a copy of such opinion is appended to this petition as Appendix A.

## JURISDICTION

The judgment of the United States Court of Appeals in the case of Featherston v. Mitchell, et al. was entered on November 10, 1969. A stay of the mandate was granted to

and including December 24, 1969. The stay of the mandate was then extended to and including January 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1966).

## QUESTIONS PRESENTED

(1) The United States Court of Appeals for the Fifth Circuit has held that the action of the Trial Judge in committing Floyd Featherston to the Federal Detention Center at Springfield, Missouri, was a proper action. Was the Trial Judge's action actually a result of failure to exercise discretion as required by 18 U.S.C. § 4244 and therefore the kind of decision condemned by the United States Supreme Court in *Yellin v. United States*, 374 U.S. 109 (1963) and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953)?

(2) Under the holding of the United States Supreme Court in *Downum v. United States*, 372 U.S. 734 (1963) — has Floyd Featherston been placed in jeopardy so that he may not again be placed on trial in regard to charges upon which he was indicted in the case of *United States of America v. Floyd Featherston*, Nos. CR-68-25-DR and CR-68-47-DR, since the mistrial in Featherston's case was based on judicial failure to exercise discretion and not on any imperious necessity to end the trial?

## CONSTITUTIONAL PROVISION INVOLVED

**UNITED STATES CONSTITUTION. AMENDMENT V.**

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ."

## STATUTE INVOLVED
## 18 U.S.C. § 4244 (1951)

"Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. *For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court.* If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused

in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1949, c.535 §1, 63 Stat. 686." (emphasis added)

## STATEMENT OF THE CASE

In the case of *United States of America v. Floyd Featherston,* Nos. CR-68-25-DR and CR-68-47-DR, petitioner, Floyd Featherston, was charged with having knowingly and willfully attempted to evade and defeat part of the income tax due and owing by him and his wife by filing a false and fraudulent income tax return for the years 1961, 1962 and 1963. A jury was selected and the case against Featherston proceeded to trial on September 17, 1968. (R. 147)[1]. The Government completed its case and rested on October 3, 1968, during the third week of trial.

Featherston then put on his case, and on October 8, 1968, during a recess to discuss summary charts to be used by Featherston's summary witness, it was indicated to the Trial Court that Featherston desired to take Dr. George Herrmann as his next witness. (R. 25). It was then brought out that Dr. Herrmann would testify as to "blackouts" which had previously been discussed briefly at a hearing on October 4, 1968, on a Motion for Production, based upon *Brady v. Maryland,* 373 U.S. 83 (1963). (R. 147). At that time, with government counsel present, the Trial Court mentioned these "blackouts" as being possibly relevant on the issue of punishment. (R. 149). Upon learning of Dr. Herrmann's proposed testimony, the government indicated that if the question of mental capacity to commit the offenses was to be in the case the trial would have to be halted and the question of mental competency determined. (R. 26).

[1]All references such as (R. 147) are to the Transcript of Record in the Court of Appeals filed with this Petition.

The Trial Court then decided to have Dr. Herrmann testify out of the presence of the jury. Thereafter, over defense counsel's objection, a mistrial was declared and Featherston was committed to the Springfield, Missouri, institution for mental examination. (R. 46-47). Featherston was then transferred to the Val Verde County Hospital after having suffered a coronary insufficiency while incarcerated in jail. (R. 152).

On October 15, 1968, the Petition for Writ of Habeas Corpus was filed (R. 11) under 28 U.S.C. § 2241 and on October 24, 1968, upon learning Featherston had been transferred back to jail from the hospital, a hearing was set on the Petition for October 28, 1968. (R. 154). After a hearing on the Petition, it was in all things denied on November 5, 1968, and Notice of Appeal was given by Featherston. (R. 508). On November 10, 1969, the lower court decision was affirmed by the United States Court of Appeals for the Fifth Circuit. (App. A). It is the judgment of November 10, 1969, which Petitioner is asking this Court to review by granting this Petition for Writ of Certiorari. (App. A).

## REASONS FOR GRANTING WRIT

A. THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE COMMITMENT ORDER WAS PROPER AND THAT IT DOES NOT MATTER WHETHER OR NOT DISCRETION WAS EXERCISED IS IN ERROR AND IS IN CONFLICT WITH THE SUPREME COURT CASES OF *YELLIN V. UNITED STATES*, 374 U.S. 109 (1963) AND *UNITED STATES EX REL. ACCARDI V. SHAUGHNESSY*, 347 U.S. 260 (1953).

On deciding that a mental examination had become necessary under the provisions of 18 U.S.C. § 4244, it became the Trial Judge's duty to meaningfully exercise his discre-

tion whether to have Featherston examined simply by a qualified psychiatrist or whether to commit Featherston to a hospital for mental examination. The ramifications of the method chosen by which to conduct the mental examination were of a constitutional nature in that to choose a method which would be extremely time consuming would cause the jury to be dismissed and a mistrial declared in a case which was almost at its conclusion. Thus the Trial Judge was faced with a duty of evaluating all the factors and circumstances in Featherston's case and then deciding whether to use one psychiatrist for an examination of Featherston so that the case might continue if the mental report was favorable or whether to commit Featherston to a hospital which would cause the Judge to declare a mistrial. Neither the government, the Trial Judge nor the United States Court of Appeals for the Fifth Circuit has denied that this particular exercise of discretion was required under the terms of 18 U.S.C. § 4244. Yet the record is clear that the Trial Judge totally failed to exercise his discretion in choosing between examination by a local psychiatrist and commitment to a hospital for examination. By the Trial Judge's own words spoken immediately after the declaration of the mistrial and the commitment of Featherston to a Springfield, Missouri, institution for mental examination, the Trial Judge illustrated that he had simply followed a predetermined policy of sending all defendants to Springfield, Missouri, for mental examination. He never even considered the use of a local psychiatrist in Featherston's case. The Trial Judge's words were:

> "Well, from my experience in the Nagel case I find that the Fifth Circuit where local psychiatrists are used, they don't give them the same standing that they do Springfield, and since that decision I have been remanding every defendant for a mental ex-

> amination to Springfield . . . . Under this statute, I have no choice. This is a 'shall' statute, and this is not the first time this situation has come up, it is a 'shall' statute . . . ." (R. 49-50).

The plain meaning of these words is that the Trial Judge had adopted a policy after the case of *Nagell v. United States,* 392 F.2d 934 (5th Cir. 1968) of simply sending all defendants to Springfield, Missouri, for mental examination under 18 U.S.C. § 4244 when the question arose. To argue that this was not the Trial Judge's policy is to argue that the words quoted above were not uttered by the Trial Judge. To argue that such an automatic policy is an exercise of discretion as required by 18 U.S.C. § 4244 is to strain all logic to the breaking point. On appeal to the United States Court of Appeals for the Fifth Circuit Featherston contended that there was no *necessity* for a mistrial in his case in that the mistrial was caused by the Trial Judge's arbitrary policy of sending all defendants to Springfield, Missouri, when Featherston could have been examined by a local psychiatrist — a method which could have allowed the trial to continue to conclusion. The court in its opinion in the Fifth Circuit simply ignores the Trial Judge's language which unequivocally shows there was an arbitrary and predetermined decision to commit all defendants to Springfield, Missouri, and instead compares the relative merits, as observed in retrospect, between choosing examination by a local psychiatrist or choosing to commit Featherston to Springfield, Missouri, and concludes that the Trial Judge was justified in ordering commitment. (App. A). Clearly, the Fifth Circuit is saying that as long as the Trial Judge made a "proper" decision, as measured by hindsight, then it is immaterial whether he actually exercised his discretion and considered alternatives or not. This reasoning is in direct conflict with the holdings

in the Supreme Court cases of *Yellin v. United States*, 374 U.S. 109 (1963) and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1953).

*Yellin* and *Accardi* show that an action of an official who has failed to exercise the discretion required by law will not be allowed to stand even if it appears that the same action would have resulted if the proper discretion had been exercised. The point is that an official vested with discretion must exercise that discretion in making decisions or else they will be overturned. The following chart illustrates the similarities of the *Yellin*, *Accardi* and *Featherston* cases:

| | **Yellin** | **Accardi** | **Featherston** |
|---|---|---|---|
| Officials Involved | Congressional Committee | Board of Immigration Appeals | Federal District Judge |
| Discretionary Question Involved | Private or Public Hearing | Suspend deportation or not | Commitment |
| Arbitrary Decision (no exercise of discretion) | Public Hearing | Deportation | Commitment |
| Effect on Individual Involved | Contempt conviction | Deportation | Mistrial over objection |
| United States Supreme Court Action | Held: Reversed Conviction for contempt and stated Yellin entitled to have Committee exercise discretion even if same result would obtain. | Held: Reversed Deportation order and held Accardi entitled to hearing where discretion exercised even if same result would obtain. | Should be held that Featherston entitled to hearing where discretion exercised and that mistrial may not be supported by failure to exercise discretion. |

The following quote from *Yellin* at 121 sums up the holdings of both *Accardi* and *Yellin:*

"The Attorney General had by regulation permitted the Board of Immigation Appeals to make final decisions upon applications for this discretionary relief, subject to certain exceptions not involved in Accardi's case. Shortly before petitioner appealed to the Board, the Attorney General published a list of 'unsavory characters' including petitioner, who were to be deported. Accardi claimed that since the Board knew he was on the list, it did not exercise the full discretion the Attorney General had delegated to it. Its decision was predetermined.

"This Court held that the Board had failed to exercise its discretion though required to do so by the Attorney General's Regulations. Although the Court recognized that Accardi might well lose, even if the Board ignored the Attorney General's list of unsavory characters, it nonetheless held that Accardi should at least have the chance given him by the Regulations.

"The same result should obtain in the case at bar. Yellin might not prevail, even if the Committee takes note of the risk of injury to his reputation or his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV."

In *Yellin* the House Committee on Un-American Activities failed to exercise its discretion as required by its rules and the United States Supreme Court refused to allow the arbitrary decision to stand. In *Accardi* the Board of Immigration Appeals failed to exercise its discretion as required by the Attorney General's regulations and the United States Supreme Court refused to allow the predetermined decision to stand. In *Featherston* the Trial Judge failed to exercise his discretion as required by 18 U.S.C. § 4244 and the United States Supreme Court should not allow this pre-

determined decision of committing all defendants to Springfield, Missouri, to stand.

The United States Court of Appeals for the Fifth Circuit has allowed the predetermined decision of the Trial Judge to stand because it speculated that the proper decision was made in any event. That this is not the law is clearly shown by *Yellin, supra,* and *Accardi, supra.* Just as Accardi and Yellin were entitled to a proper exercise of discretion, so was Floyd Featherston regardless of what the result might have been.

The government will surely argue that if we use hindsight it is clear that if discretion had been exercised the Trial Judge would still have chosen commitment and therefore this shows that discretion *was* exercised. However, this type of deductive reasoning is simply not available for the government to speculate upon since the Trial Judge's own words[2] (R. 49-50) completely refute the idea that commitment was not a predetermined decision. The Trial Judge's statement makes it unequivocally clear that Floyd Featherston did not receive the exercise of discretion to which he was entitled.

Thus the refusal of the United States Court of Appeals to overturn the predetermined decision of the Trial Judge in Featherston is in direct conflict with the United States Supreme Court holding in *Yellin v. United States* and *United States ex rel. Accardi v. Shaughnessy.* Therefore, it is requested that this Court grant the Petition for a Writ of Certiorari in order to review this decision in *Featherston v. Mitchell, et al.* as decided by the United States Court of Appeals for the Fifth Circuit. (App. A).

Since it has been plainly shown that the Trial Judge

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2". . . since that decision I have been remanding every defendant for a mental examination to Springfield . . ." (R. 49-50).

failed to exercise his discretion in handing down an order which caused a mistrial, it is equally clear that the declaration of the mistrial itself was based on a failure to exercise discretion in that it is based not on a reasoned evaluation of the circumstances involved, but rather on the Trial Judge's unthinking, arbitrary and predetermined decision to send all defendants to Springfield, Missouri, for mental examination.[3]

It must be realized that the right of Floyd Featherston to have the jury impaneled to hear his case proceed to verdict, as guaranteed by the Fifth Amendment of the United States Constitution, cannot be restored as were the rights of *Yellin* and *Accardi*. The time for the exercise of discretion has passed. The jurors chosen to sit in judgment on Floyd Featherston have gone home. The courtroom is empty and the trial which Floyd Featherston was entitled to have completed is gone forever — except as it weighs on the mind of Floyd Featherston every day until this matter is put to rest. This leads to the second reason for granting the writ.

B. IT CANNOT BE SAID THAT THERE WAS AN IMPERIOUS NECESSITY FOR A MISTRIAL IN FEATHERSTON'S CASE ACCORDING TO THE STANDARDS OF *UNITED STATES V. DOWNUM*, 372 U.S. 734 (1963) IF THE TRIAL JUDGE'S DECLARATION OF THE MISTRIAL WAS BASED ON HIS ERRONEOUS FAILURE TO EXERCISE DISCRETION.

The Fifth Amendment of the United States Constitution provides that "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

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3". . . since that decision I have been remanding every defendant for a mental examination to Springfield . . ." (R. 49-50).

This right not to be twice placed in jeopardy is a fundamental constitutional right of every American citizen and is emphasized in the magnitude of its importance by the fact that it is a part of the Bill of Rights which is the foundation of our system of democracy. This essential and paramount right may not be subordinated except when there is an "imperious necessity" to do so and only in "very extraordinary and striking circumstances." *Downum v. United States*, 372 U.S. 734 (1963). Thus, it may be seen that the right of a criminal defendant to have his trial completed by a jury originally impaneled is a valued one which may not be sacrificed except in the face of overwhelming difficulties which leave no alternative but to end the trial without a verdict. The reasoning underlying this strict requirement is especially persuasive when the relative positions of the defendant and the state are compared. Mr. Justice Black emphasized this in pointing out "that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957).

It is clear that repeated trials subject a defendant to serious hardship. In light of the extreme importance attached to the right not to twice be placed in jeopardy, the Supreme Court of the United States has stated the standard to be applied by a reviewing Court as follows:

> "We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Downum, supra*, at 738.

The law is that the trial court, in order to have been justified in declaring a mistrial over the defendant's objection, must have exercised its judicial discretion and found very extraordinary and striking circumstances showing a manifest necessity for the mistrial. *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824); *Downum v. United States*, 372 U.S. 734 (1963). This is not merely a balancing test between circumstances which dictate proceeding with a trial and circumstances which dictate a mistrial. Rather, the only situation in which a mistrial may be resorted to over the defendant's objection is when there are no reasonable alternatives which would or could allow the trial to continue. To say that the declaration of a mistrial over the defendant's objection was reasonable is not enough; it must be shown that the trial court took all of the relevant circumstances into account and found that there was no other choice but to end the trial. It is within this context that this Court must decide whether the mistrial declared in the case of *United States of America v. Floyd Featherston*, Nos. CR-68-25-DR and CR-68-47-DR, was a proper exercise of judicial discretion.

The rationale for justifying the mistrial in Featherston's case appears to be that it was "necessary" to send Mr. Featherston to Springfield, Missouri, for mental examination. The Trial Judge felt that this action would take so long that the jury could not be held over and therefore the trial had to be ended. The flaw in this reasoning is that there is no showing that it was necessary for the mental examination to take place in Springfield, Missouri. Rather, it has been shown that this action came about as a result of an arbitrary and predetermined decision of the Trial Judge. This was an abrogation of the Judge's duty to exercise his discretion under 18 U.S.C. § 4244.

Under 18 U.S.C. § 4244 the Trial Judge had a course of action open by which the trial could have proceeded to verdict. This course of action was never considered by the Trial Judge and therefore it cannot be said that there was a necessity for the mistrial. As long as there was a reasonable alternative available by which the Judge could have avoided the mistrial, he had an obligation to consider that course of action. Such a course of action was that the Judge could have recessed the trial, had a mental evaluation conducted by a psychiatrist, and if the doctor's opinion was that the defendant was mentally competent, then continue with the trial to verdict.

That this was a practical and reasonable course of action to take under the circumstances is clearly shown by the case of *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). In that case, after the trial had begun, a question arose as to the defendant's mental competency under 18 U.S.C. § 4244. Based upon government counsel's request, the trial was recessed in order that a psychiatric examination could be made in regard to the defendant. The psychiatric examination was made and the trial then began again and proceeded to verdict. Further, the fact that an examination by a local psychiatrist during a recess of the trial was a reasonable course of action to take is shown by the cases of *Ruud v. United States*, 347 F.2d 321 (9th Cir. 1965), *cert. denied*, 382 U.S. 1014 (1966) and *Meador v. United States*, 332 F.2d 935 (9th Cir. 1964). In the *Ruud* case the court simply appointed a psychiatrist and continued the case. In *Meador* the court appointed psychiatrist made a one-hour examination and the court proceeded with the case on the basis that there was no need for a full hearing on mental competency.

Examination by a local psychiatrist was all that was

needed in the *Featherston* case, and the Trial Judge would have realized this if he had exercised his discretion and examined the circumstances of the case. It is clear beyond argument that Featherston was entitled to have the Trial Judge at least consider this alternative and to decide that it was not a reasonable alternative before declaring a mistrial. Until all reasonable alternatives other than commitment to the Springfield, Missouri, institution had been considered and rejected, the Trial Judge could not have found any necessity for a mistrial. It is clear, however, that the Trial Judge did not consider other alternatives and therefore there was never a necessity for the mistrial as prescribed by the standards in *Downum v. United States, supra*..

The United States Court of Appeals for the Fifth Circuit has indicated that examination by a local psychiatrist was not a meaningful choice since there was no psychiatrist in Del Rio, Texas, where the trial took place and that a local psychiatrist would not have been able to determine Featherston's competency during the first few days of the trial which lasted nearly four weeks. These conclusions are not supported by the record. No explanation is even attempted as to why a psychiatrist could not have come to Del Rio to examine Featherston. The Trial Judge himself stated that Featherston could have received the quality examination he deserved in San Antonio, Texas, a city only 150 miles from Del Rio. (R. 160).

If Featherston had been examined by a San Antonio psychiatrist and found to be mentally competent to stand trial and to have been mentally competent during the course of the trial, then the trial could have proceeded to conclusion and the time, energy, money and effort of a Trial Judge, Government Attorneys, Defense Attorneys, Defendant and witnesses would not have been wasted by the

declaration of a mistrial. 18 U.S.C. § 4244 certainly contemplates the use of a local psychiatrist as could have been found in San Antonio. Wasn't it worth a day's recess in the trial to ascertain whether the use of a San Antonio psychiatrist could have saved the trial? The obvious answer is that it was patently unreasonable not to do everything possible to utilize a San Antonio psychiatrist and that it was even more unreasonable to declare a mistrial over the defendant's objection simply because the Trial Judge prefers to use psychiatrists at Springfield, Missouri. The plain truth is that the Trial Judge refused to consider the use of a local psychiatrist even though the circumstances of the case cried out for the use of this method not because the Judge thought it was not a meaningful choice or because it was an impractical or impossible method, but instead refused to consider a San Antonio psychiatrist because the Judge simply does not use local psychiatrists since the *Nagell* case in which the same Trial Judge was reversed when local psychiatrists were used.

The "Nagel" case referred to by the Trial Judge is *Nagell v. United States*, 392 F.2d 934 (5th. Cir. 1968) in which this same Judge was reversed with instructions to acquit, after testimony offered by psychiatrists for the Government's position was found to be unconvincing and ill prepared by the United States Court of Appeals for the Fifth Circuit. In referring to the *Nagell* case in the Order denying Featherston's Petition For A Writ of Habeas Corpus, the Trial Judge characterized *Nagell* as a case which was dismissed largely as a result of "low quality" local psychiatrists. (R. 160). This is a somewhat curious analysis in that the Fifth Circuit Court of Appeals remanded the case with instructions to acquit on the basis that the evidence was so overwhelming as to Nagell's insanity that

there was no need for another trial. Since the *Nagell* case, the Trial Judge simply sends every defendant to Springfield for mental examination on the basis that "Springfield" psychiatrists have more standing with the Fifth Circuit. (R. 49).

Any assertion that a local psychiatrist would have been limited in his examination to the day of the examination is in error. The proper inquiry was whether Featherston understood the nature of the proceedings against him and whether he could cooperate with his counsel during the trial. A psychiatrist using proper interview procedures could, in a matter of hours or a day or two at the most, certainly have determined Featherston's mental competency during the weeks in which the trial had been in progress.

The use of a local psychiatrist in Featherston's case was a reasonable, practical and intelligent method which should, at the very least, have been seriously considered by the Trial Judge and was certainly the method which should have been utilized in determining Featherston's mental competency. Featherston's rights under the United States Constitution may not be sacrificed because the Trial Judge refused to consider the use of a local psychiatrist as he was required to do by a statute passed by the Congress of the United States.

Featherston, under the Constitution of the United States of America, was entitled to have an opportunity to have the jury impaneled hear his case and to have that jury reach a verdict. This opportunity was irretrievably and unconstitutionally wrenched from him by a Trial Judge, who by his own admission[4], simply abrogated the exercise of discretion which could have allowed the trial to continue to verdict.

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4". . . since that decision I have been remanding every defendant for a mental examination to Springfield . . ." (R. 49-50).

Judicial neglect is no better reason in our case to do away with the defendant's constitutional rights than was prosecutorial neglect in *Downum*.

Therefore, Featherston may not again be placed on trial in regard to charges upon which he was indicted in the case of *United States of America v. Featherston*, Nos. CR-68-25-DR and CR-68-47-DR. To do so would be to "twice put him in jeopardy of life and limb." As a result any further confinement of any nature is illegal and unconstitutional and Featherston should be immediately released from all custody and criminal charges should be dismissed. The basic right of Floyd Featherston under the Fifth Amendment to the Constitution of the United States must not be sacrificed because a Judge of the United States District Court failed to exercise his discretion under a statute of the United States. The holding of the United States Court of Appeals for the Fifth Circuit that there was a manifest necessity for a mistrial in Featherston's case is in conflict with *Downum v. United States, supra.*

C. THE LAW IN REGARD TO DOUBLE JEOPARDY IS UNSETTLED AT THE PRESENT TIME IN THAT THE UNITED STATES SUPREME COURT WILL HEAR A DOUBLE JEOPARDY CASE STYLED *UNITED STATES V. JORN*, DOCKET NO. 84 DURING THIS TERM.

Since this Court will hear argument in the case of United States v. Jorn, Docket No. 84, it is respectfully suggested that the case of *Featherston v. Mitchell, et al.* involves essentially the same basic questions of law as are involved in the *Jorn* case, and, that therefore, the *Featherston* case ought to be consolidated for hearing with the *Jorn* case.

Additionally, the *Featherston* case involves a question which is in the interest of the public as a whole and a ques-

tion which will recur in the future in a great number of criminal cases. As the matter stands now, every criminal defendant being tried in the Western District of Texas whose mental competency is in question will automatically be committed to Springfield, Missouri, for mental examination regardless of the circumstances of his case. This policy is in direct conflict with the provisions of 18 U.S.C. § 4244 and the *Accardi* and *Yellin* cases by the Supreme Court. The fact that Floyd Featherston was deprived of his Constitutional rights under the Fifth Amendment because of such an illegal policy cries out for this Court to restore those rights to Featherston and for the Court to make it clear that such an arbitrary and predetermined abrogation of judicial duty will not be tolerated in future cases. The course of action to be taken in regard to mental competency questions in future years will be decided by the decision of this Court. A denial of the Petition for Writ of Certiorari will leave the door open for the Trial Judge to continue to ignore the dictates of the Congress of the United States and this Court. The question should be settled now.

## CONCLUSION

For the reason stated herein, Petitioner prays that this Court grant this Writ and consolidate this case for hearing with the case of *United States v. Jorn*, Docket No. 84.

Respectfully submitted,

GORDON G. HAWN
RALPH LANGLEY
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*Attorneys for Petitioner*

*OF COUNSEL:*
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**CERTIFICATE OF SERVICE**

The foregoing Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit was served on the Solicitor General of the United States Department of Justice, Washington, D.C. 20530 by sending him ..... copies of the Petition through the United States mails, air mail, postage prepaid on this the ..... day of ....., 19.....

.....

*Attorney for Petitioner*

APPENDIX
A
IN THE

# United States Court of Appeals

## FOR THE FIFTH CIRCUIT

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**No. 27379**

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**FLOYD FEATHERSTON,**
**Petitioner-Appellant,**

**versus**

**JOHN MITCHELL, Attorney General of the United States, ET AL.,**
**Respondents-Appellees.**

---

*Appeal from the United States District Court for the Western District of Texas*

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(November 10, 1969)

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Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: Floyd Featherston, while in federal custody and subject to the District Judge's order committing him for psychiatric observation to the federal hospital in Springfield, Missouri, petitioned the same District Judge for a writ of habeas

corpus on the ground that he was being detained in violation of his federal constitutional right not to be placed twice in jeopardy for the same offense. 28 U.S.C. §2241 (c) (3) (1964); *see* U.S. Const. amend. V.

The United States charged Featherston with having knowingly and wilfully attempted to evade and defeat part of the income tax due and owing from him and his wife for the taxable years 1961, 1962, and 1963, in violation of Int. Rev. Code of 1954, § 7201, by filing a false and fraudulent income tax return for each of those years. A jury trial on this charge began on September 17, 1968, in Del Rio, Texas. On October 8, 1968, the District Judge ordered Featherston's commitment for psychiatric observation to the Springfield hospital, *see* 18 U.S.C. § 4244 (1964), discharged the jury, and declared a mistrial. Featherston contends that no legal basis exists for his present detention because the declaration of a mistrial operates to bar the Government from commencing a new trial on the tax evasion charge. Finding this contention unsound, we affirm the District Court's order denying Featherston's petition. 28 U.S.C. § 2241(c) (1964).

The purpose of the constitutional prohibition against "double jeopardy," applicable to the federal government and the states, is to prevent these governments from making repeated attempts to convict an individual of an alleged offense, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well an enhancing the possibility that even though innocent he may be found guilty." *Green v.*

*United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957). *See also Benton v. Maryland*, 395 U.S. 784, 795-796, 89 S. Ct. 2056, 2063 (1969); *United States v. Ball*, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194 (1896). Occasions will arise, however, when a second trial constitutionally may be had on the same charge against a defendant notwithstanding that the jury impaneled for the first trial was discharged without reaching a verdict and over the defendant's objection. *E.g., United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165 (1824). Federal district judges are empowered to declare mistrials in criminal cases without causing a subsequent trial to be barred "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.; see Downum v. United States*, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034 (1963). Exercising the discretion of declaring a mistrial does not bar a second trial if there is an "imperious necessity" for so doing, *Downum v. United States*, supra. Such a need will arise "only in very extraordinary and striking circumstances," *United States v. Coolidge*, 25 F. Cas. 622, 623 (No. 14,858) (C.C.D. Mass. 1815), and each case will turn upon its own particular facts. *Downum v. United States*, 372 U.S. 734, 737, 83 S. Ct. 1033, 1035 (1963). Mindful of the Supreme Court's admonition that any doubt should be resolved in favor of the liberty of the individual, in order to prevent the exercise of "an unlimited, uncertain, and arbitrary judicial discretion," *id.* at 738, 83 S. Ct. at 1035-1036, *quoting United States v. Watson*, 28 F. Cas. 499, 501 (No. 16,650a) (C.C.D.C. 1856), we have no doubt that a mistrial was

manifestly necessary in this case to protect the rights of the accused and, by so doing, to serve the ends of public justice. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824). We have considered and rejected Featherston's arguments on this appeal as follows.

A mistrial was declared in this case because the District Judge determined that Featherston's commitment for psychiatric observation was necessary to the determination he had ordered of Featherston's mental competency to stand trial. Featherston contends that the District Judge erred in ordering such a determination of his competency. The record of the trial refutes this contention, for it shows that a serious question regarding the defendant's mental competency was raised in open court during the fourth week of that proceeding. Consequently, in making this order the District Judge was merely complying with the mandate of 18 U.S.C. § 4244 (1964). Section 4244 provides in part:

> "Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the

> trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition. . . ."

In this case the United States Attorney made an oral motion for section 4244 determination. Therefore, the District Judge was required to order such a determination unless the motion was made in bad faith or was based upon a frivolous ground. *Caster v. United States*, 5 Cir., 1963, 319 F. 2d 850, 852, *cert. denied*, 376 U.S. 953, 84 S. Ct. 972 (1964). *See also Krupnick v. United States*, 8 Cir., 1959, 264 F. 2d 213, 216. That Featherston might have been competent to stand trial is irrelevant to the question whether a determination of this fact was necessary.

The test of mental competency under section 4244 is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceeding against him." *Dusky v. United States*, 362 U. S. 402, 80 S. Ct. 788, 789 (1960); *Blake v. United States*, 5 Cir., 1969, 407 F. 2d 908, 910 (en banc). Once the United States Attorney has reasonable cause to believe that the accused does not possess this ability and understanding, he must move for a determination according to the terms of section 4244, and the trial court must grant the motion. We agree with Featherston that the relevant inquiry under this section is not whether a defendant can be held criminally responsible for the

acts with which he is charged, *see Blake v. United States*, 5 Cir., 1969, 407 F. 2d 908 (en banc), but whether he understands the nature of the proceedings against him and is able to assist in his own defense. *See Shale v. United States*, 5 Cir., 1968, 388 F. 2d 616, 618, *cert. denied*, 393 U.S. 867, 89 S.Ct. 456 (1968); *Floyd v. United States*, 5 Cir., 1966, 365 F. 2d 368, 374 n. 9. We cannot accept Featherston's contention, however, that no question regarding his competency was raised during the course of his trial.

The trial had progressed into its fourth week and the Government had presented its case when Featherston's counsel called Dr. George H. Hermann, the defendant's physician, as a witness for the defense. Hermann testified in the absence of the jury following a conference in chambers between counsel and the Court as to the purpose of the medical witness' appearance. Through his testimony the physical and mental condition of Featherston from 1959 or 1960 until the present was developed, ostensibly for the defensive purpose of explaining Featherston's failure to take the witness stand. This testimony has been well summarized by the District Court: It developed that Featherston, a diabetic, suffered from "blackouts." What was meant by this term were

> ". . . periods of from 48 to 72 hours in which [Featherston] would transact business and behave normally, but during which he would not be fully aware of what he was doing or where he was, and about which he would remember nothing afterward. These periods would come and go with no outward warning, and can not be

> detected by even a physician, without chemical tests, unless in its most chronic stages when the subject is near a coma or semi-conscious. This condition may or may not have existed on each day of the trial."

*Featherston v. Clark, et al.*, W.D. Tex., 1968 [Civ. No. 68-20-DR, filed Nov. 4]. Thus Featherston's own witness raised the issue of the defendant's present competency to stand trial. Any argument that the section 4244 motion made in this case was either frivolous or in bad faith is, therefore, without merit.

Featherston next argues, assuming the necessity of a judicial determination of his mental competency according to the provisions of section 4244, that the District Judge abused his discretion, or failed to exercise his discretion, by ordering that the defendant be committed to the hospital in Springfield. Section 4244 provides in this regard that

> ". . . [T]he court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. . . ."

Since this provision vests in the trial court discretion to determine where and by whom an accused will be

examined and whether commitment for this purpose is necessary, Featherston contends that the District Judge, by apparently adhering to a policy of uniformly remanding to Springfield all defendants ordered for psychiatric observation, failed meaningfully to exercise proper discretion in this case. Instead, Featherston argues, the District Judge should have considered the use of a local psychiatrist as an alternative to commitment to Springfield. Had the Judge considered this alternative, the defendant concludes, his choice of Springfield would have been unreasonable in light of the circumstances of this case.

The record refutes Featherston's argument. Use of a "local" psychiatrist was not a meaningful alternative, since the District Judge determined, and Featherston does not dispute, that there were then no "qualified psychiatrists" in or around Del Rio, where the trial was conducted. The nearest place to which Featherston could have gone for the quality examination to which he was entitled was San Antonio, Texas, approximately 150 miles from Del Rio. The District Judge was unfamiliar with San Antonio and would have required the assistance and advice of government officials there to obtain the services of a psychiatrist. We cannot say that the District Judge abused his discretion by not arranging for the services of a San Antonio psychiatrist, whether in San Antonio or in Del Rio. Moreover, in view of the particular nature of Featherston's condition, we believe that the District Judge was fully justified in ordering commitment to Springfield, where Featherston could be thoroughly examined by doctors familiar with the *Dusky* standard of mental

competency. *See Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 789 (1960).

Featherston's condition is apparently such that even a physician cannot discern by merely observing the defendant whether he is suffering one of his "blackout" spells. Instead, a contemporaneous blood test and examination as well as observation are required for a determination of whether Featherston is or is not suffering a spell on a given day. Dr. Hermann testified that Featherston would not be fully aware of what he was doing during the course of one of these spells. It is obvious that if Featherston suffered such a spell on one or more days of the trial, he might not have been able at that time to consult with his attorney with a reasonable degree of rational understanding or to have a rational understanding of the proceedings against him. A determination on the day when the issue of Featherston's mental competency was first raised that the defendant was not then suffering a blackout would not have settled the question whether he had been so afflicted on the previous days of the trial. Clearly, a thorough examination of Featherston was required for the purpose of determining whether his mental impairment, if any, during the course of a blackout made him mentally incompetent by the *Dusky* standard.

The testimony of Dr. Hermann raised a serious question respecting the defendant's ability to understand the nature of the proceedings against him and to assist in his own defense on every day of the trial. Because such a question was raised, we conclude under the

circumstances here that the trial could not have progressed no matter how or where the subsequent psychiatric examination required by section 4244 was made. Underlying section 4244 is the well-established principle in our jurisprudence that public justice is not served by trial of an individual for an alleged offense when that individual is mentally unable reasonably to comprehend the action being taken against him or to assist in the defense of his liberty. Protection of Featherston's right not to be so tried, notwithstanding the protestations of his lawyers, made imperative a mistrial in this case. Declaration of that mistrial will not bar further action against Featherston when and if he is determined to be mentally competent to stand trial.

AFFIRMED.

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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OCTOBER TERM 1969

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## No. 27379

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D. C. Docket No. Civ 68-20-DR

FLOYD FEATHERSTON,
*Petitioner-Appellant,*

versus

JOHN MITCHELL, Attorney General of the United States, ET AL.,
*Respondents-Appellees.*

*Appeal from the United States District Court for the Western District of Texas.*

Before GEWIN, THORNBERRY and AINSWORTH, Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that petitioner-appellant pay to respondents-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 10, 1969

Issued as Mandate:

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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FLOYD FEATHERSTON, PETITIONER

*v.*

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General,*

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*Washington, D. C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1969

---

No. 1061

FLOYD FEATHERSTON, PETITIONER

*v.*

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-30) is not yet officially reported. The memorandum order of the district court denying petitioner's petition for a writ of habeas corpus (R. 144-165)[1] is reported as *Featherston* v. *Clark*, 293 F. Supp. 508 (W.D. Tex.).

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[1] "R." references are to the printed appendix certified to this Court from the court of appeals.

## JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. The petition for a writ of certiorari was filed on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the constitutional prohibition against double jeopardy bars retrial of a defendant whose first trial ended when the trial judge ordered him committed to a government hospital for a mental examination and declared a mistrial, upon finding that medical testimony given by petitioner's physician gave reasonable cause to believe that petitioner might be unable to understand the proceedings against him or properly to assist in his own defense.

## STATUTE INVOLVED

18 U.S.C. 4244 is set out in the petition (pp. 3-4).

## STATEMENT

On February 17, 1968, petitioner was arraigned and pleaded not guilty on an indictment charging him with willfully attempting to defeat and evade personal income taxes for 1961, 1962 and 1963. At that time, his attorney informed the district court that no issue of mental incompetency would be raised. (R. 145.)

On October 8, 1968, in the course of a jury trial which commenced on September 17, 1968, petitioner

called as a defense witness his personal physician, Dr. George Hermann. In a voir dire examination conducted for the purpose of informing the court what issues would be raised by this medical evidence,[2] Dr. Hermann testified that he had been treating petitioner for arteriosclerosis and diabetes mellitus since 1959 and that these interacting diseases caused petitioner to suffer episodes of confusion and lapse of memory for periods varying from a few hours to several days at a time. Dr. Hermann also testified that such episodes are not obvious to other people and that during such episodes petitioner can transact business and appear normal though not fully aware of what he is doing. (R. 29-35.) Dr. Hermann answered "I am afraid so, yes", to the court's question whether this condition would affect petitioner's ability to take the witness stand and to cooperate with and assist his counsel in the conduct of his defense. (R. 32, 44-45.)

After Dr. Hermann's testimony, the United States Attorney made an oral motion to adjourn the case until an evaluation could be made of petitioner's competency to commit the offenses charged and capacity to cooperate with counsel and assist in his own defense (R. 37). Petitioner's counsel declined to join in this motion and objected to a mistrial (R. 38, 43).

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[2] Petitioner's counsel declined to inform the district court as to what jury instructions would be requested on the basis of this evidence (R. 39-40) though the district court found (R. 150) that two purposes of the evidence were to explain petitioner's failure to take the witness stand and to raise a doubt as to his mental capacity to form the specific intent necessary to commit the offenses charged.

The district court thereupon committed petitioner for a period of not more than 90 days to a hospital to be designated by the Attorney General for examination and a report on his mental condition (R. 59-61). A mistrial order was then entered (R. 61-62).

Petitioner's counsel objected to the order for commitment, stating that petitioner never intended to contend he could not assist in his own defense, and requesting either admission to bail or an order that the examination be conducted by local doctors in Del Rio or San Antonio, Texas (R. 48-49).

On October 15, 1968, petitioner filed a petition for a writ of habeas corpus, alleging that his continued confinement was illegal because the mistrial order was an abuse of discretion and that he could not again be placed in jeopardy of conviction (R. 11-23). At a hearing on this petition, Dr. Hermann gave further details, largely repetitive, about petitioner's medical history and condition (R. 227-253, 463-467).

In its memorandum order denying the petition (R. 144-165), the district court found the facts as stated herein and concluded that, on the evidence of petitioner's mental incompetency to stand trial, the United States Attorney was required to make a motion under 18 U.S.C. 4244 for a judicial determination of competency, and that it was "mandatory" for the district court to cause a mental examination to be made and to make a determination of petitioner's mental competency before proceeding with the cause. It found that prior to the testimony of Dr. Hermann, neither the government nor the district court had reasonable cause to require such a mental examina-

tion. The court noted the elusive nature of petitioner's episodes of amnesia and the necessity of proper diet and regular insulin treatment to bring his illness under control. The district court observed that the issue of mental competency was not confined to petitioner's condition on October 8, 1968, but extended to the entire course of the trial prior thereto and that the problem was "new" to the court. It reasoned that a hasty examination by local psychiatrists would be insufficient even if it resulted in a reliable determination of petitioner's competency on October 8, 1968, because the evidence had put in question petitioner's condition throughout the entire trial. The district court stated that its experience with local medical personnel and facilities was such that it found that a complete examination at the Springfield, Missouri, Federal Medical Center, where doctors were familiar with the legal standards for trial competency, was needed to enable the court to determine whether petitioner could stand trial.

The district court concluded (R. 164) that "there was a manifest necessity for a mistrial" and denied the petition for a writ of habeas corpus. It ordered petitioner released to the custody of Dr. Hermann pending determination of the cause, on conditions permitting Dr. Hermann to deliver petitioner into custody if he did not follow the regimen prescribed by the doctor (R. 467, 511).

## ARGUMENT

The stated facts show that the medical testimony presented to the court by petitioner's witness created,

without prior notice or warning, a baffling, if not insoluble, problem in retrospective fact finding. The court of appeals aptly summarized the situation and the almost inevitable conclusion that a mistrial was necessary (Pet. App. 29-30):

> The testimony of Dr. Hermann raised a serious question respecting the defendant's ability to understand the nature of the proceedings against him and to assist in his own defense on every day of the trial. Because such a question was raised, we conclude under the circumstances here that the trial could not have progressed no matter how or where the subsequent psychiatric examination required by section 4244 was made.

This dilemma was noted by the district court prior to declaring a mistrial (R. 45), and in its subsequent opinion the district court said (R. 162-163):

> The point petitioner misses is that a mistrial in this case was "manifestly necessary" regardless of how or where the mental examination of petitioner was held. A temporary recess of the trial, to be resumed after an examination and report of a local psychiatrist and a judicial determination, if warranted, that petitioner was competent on October 8, 1968, the day all this arose, would not have "saved the trial" as petitioner alleges. While this procedure would have settled the question of petitioner's mental competency on that day, it would have told the Court nothing of his mental competency during the prior three-and-one-half weeks of trial. The nature of petitioner's condition is such that even a physician cannot tell if he is in one of his "spells" or "blackouts" by mere observation, and only a

> contemporaneous blood test and examination can reveal whether petitioner is truly normal on any one day. Thus, a conviction in this case would have meant nothing. It would forever be open to attack on grounds that could not have been refuted by the Government or determined against the petitioner by the Court.

As acknowledged by the court of appeals (Pet. App. 24-25), the district court was "required" by 18 U.S.C. 4244 to order a determination of mental competency, and, in view of the circumstances, it appears clear that the trial could not safely have been recessed long enough to permit an adequate examination to take place with any expectation that the integrity of the trial in process could be maintained. These circumstances include, *inter alia*, the obvious necessity for correcting and stabilizing the physical condition which affects petitioner's mental competency, the length of the observation period required to detect the occurrence of lapses of memory, the admitted lack of qualified psychiatrists in Del Rio, Texas, the inevitable delays in investigating the existence of, and procuring, adequate facilities and medical services in San Antonio, Texas, the dangers inherent in prolonged separation of the jury and their increasingly hazy recollection of the evidence, and the entire complex of intangible elements which are recognized in the respect accorded to the exercise of discretion by a trial judge. The stated preference of the trial judge for commitments to the Federal Medical Center in no way shows that this discretion was not exercised.

There was in the court's mistrial ruling "no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688-689. Nor is this a case where the prosecutor procured the mistrial to extricate himself from difficulties resulting from his inability to have his witnesses present when his case was called for trial, as in *Downum* v. *United States*, 372 U.S. 734. The circumstances vindicate the opinion of the trial court that "manifest necessity" (R. 164) dictated a mistrial ruling, and called for the application of this Court's language in *Gori* v. *United States*, 367 U.S. 364, 368:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

*United States* v. *Jorn*, No. 84, October Term, 1969, now pending decision in this Court, does not require review of petitioner's case on the merits, or delay in disposing of his petition. In *Jorn*, as in *Gori* v. *United States*, *supra*, the occasion for the mistrial was the trial court's doubts about the manner in which the prosecution was presenting its case. Here, the occasion was a concededly mandatory interruption in the trial caused by petitioner's own evidence of facts known to him but unknown to the prosecutor or the district court prior to the commencement of the trial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOHNNIE M. WALTERS,
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FEBRUARY 1970.

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